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September 12, 2014

Dr. Susan Hedman, Regional Administrator
U.S. Environmental Protection Agency Region V
77 West Jackson Boulevard
Chicago, IL 60604

Subject: EPA's "Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs"

Dear Dr. Hedman:

I write to thank you and your staff for conducting a telephone conference call on September 4th in which we began discussing concerns states like Wisconsin have with the Environmental Protection Agency's "Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs," a proposal we had seen referenced on EPA's website.[1] Wisconsin continues to respect and recognize tribal sovereignty, and wishes to fully understand this proposed change. At the conclusion of the conference call your staff expressed its willingness to consider additional written questions or comments Wisconsin might submit, and so I write for that purpose as well. Wisconsin's questions, though not exhaustive given the short notice we've had, include the following.

What is the specific evidence of Congressional intent that EPA believes provides it the authority to reverse its longstanding interpretation about the need for tribes to demonstrate inherent authority? In 1991 EPA adopted an interpretation of the Clean Water Act Treatment in the Same Manner as a State (TAS) provision which required tribes to demonstrate their inherent authority to regulate water quality:

> EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. See Montana, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of Montana, Brendale, and other applicable case law.

56 Fed. Reg. 64,876-01 at 64,880 (December 12, 1991). Now, 23 years later, after implementing the statute in this manner and without further direction from or correction by Congress, EPA proposes to find a contrary Congressional intent – one of federal delegation.

[1] http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm

This question was addressed in a preliminary fashion in the course of the September 4th conference call. As we understood EPA's comments, it relies in part on its belief that some courts have indicated their acceptance of or favorable view towards the idea that Congress delegated federal authority to tribes under the Clean Water Act TAS provision, but EPA acknowledges that no courts have decided a case on that basis. More recently EPA provided legal citations to the cases it relies upon but we have not yet had the opportunity to review them and for that reason are not yet in a position to comment meaningfully on their significance.

Why does EPA propose to switch from the "conservative" approach it took in 1991 in discerning Congressional intent regarding delegation? In the September 4th conference call, and in the materials EPA now has provided Wisconsin, EPA has emphasized that its 1991 policy and its subsequent practice for the last several decades was based on "a cautious approach" to interpreting the Clean Water Act:

> EPA took a cautious approach in 1991 when it interpreted a Clean Water Act (CWA) provision to mean that each tribe seeking to administer a regulatory program must demonstrate its own inherent regulatory authority.

"Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs, Prepared by the EPA Office of Science and Technology, May 2014." In response to a question from Minnesota's representative to last week's conference call, however, your staff indicated that no tribal application had ever been denied for lack of inherent authority. This should come as no surprise since EPA publicly announced in 1991 that it did not intend to deny any tribal applications on this basis[2] and in 23 years of implementing the TAS statute it hasn't. What need is there for EPA to take a "less-than-cautious" approach to interpreting the statute?

Why does EPA propose to take an approach that effectively eliminates the only EPA-recognized ground for state opposition to a tribal TAS application? Not only does the proposed reinterpretation appear unnecessary, it would deny Wisconsin and all other states the opportunity to oppose a tribal TAS application by asserting a competing claim of jurisdiction. Under existing EPA regulations, "appropriate governmental agencies" – which for all practical purposes means only states[3] - may be heard to dispute tribal assertions of authority to regulate water quality:

> 40 CFR § 131.8 Requirements for Indian Tribes to administer a water quality standards program. …
> (c) Procedure for processing an Indian Tribe's application. …
> (2) Within 30 days after receipt of the Indian Tribe's application the Regional Administrator shall provide appropriate notice. Notice shall: …
> (ii) Be provided to all appropriate governmental entities.
> (3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. **Comments shall be limited to the Tribe's assertion of authority**.

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[2] "Rather than formally deny the Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the Tribal program so that Tribal recognition as a State may occur." 56 Fed. Reg. at 64,885.

[3] As EPA's policy handbook on the subject indicates, this term refers to "States and other governmental entities located contiguous to the reservation and that possess authority to regulate water quality under section 303 of the Act." http://water.epa.gov/scitech/swguidance/standards/handbook/chapter01.cfm#section8

(Emphasis added). The effect of the proposed reinterpretation - eliminating any requirement that a tribe demonstrate its authority to regulate water quality - would be to deny states the only ground for objection that EPA has ever indicated it would entertain. This despite the rule, at least in this federal circuit, that:

> This court has indeed held that, in some situations, state ownership of lake beds may restrict a tribe's authority to regulate the waters running over those beds. In *Wisconsin v. Baker*, 698 F.2d 1323, 1335 (7th Cir.1983), we found that, because the state of Wisconsin held title to the underlying lake beds in a reservation, the Chippewa Band was precluded from restricting hunting and fishing in the reservation waters.

Wisconsin v. E.P.A., 266 F.3d 741, 746 (7th Cir. 2001), cert. denied 535 U.S. 1121 (2002).[4] That holding was entirely consistent with the United States Supreme Court's rulings that:

> "[i]t is the settled rule of law in this court that absolute property in, and *dominion and sovereignty over*, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, *sovereignty and jurisdiction* in that behalf as the original States possess within their respective borders." On many occasions, before and since, this Court has stated or restated these words

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 474 (1988) (quoting *Knight v. United States Land Association,* 142 U.S. 161, 183 (1891)) (emphasis added).[5] Why does EPA propose to foreclose any assertions of such state authority?

How are existing TAS applications to administer water quality standards programs going to be affected? When this question came up in our September 4th conference call EPA told us that all pending applications would be processed under the existing policies and rules, i.e.., that tribal applicants for TAS authority to establish water quality standards would have to demonstrate inherent tribal authority and that the tribes had been informed of EPA's position in this respect. Can you please confirm this and inform us on which Wisconsin tribes have pending applications?

After a tribe is granted water quality program TAS authority for one area, what criteria would EPA apply before the tribe's TAS coverage may be extended to other areas (e.g., off-reservation trust lands) which may be adjacent to water bodies? This question too was raised in the course of our September 4th conference call. We understood EPA to say in response that any tribal request to expand existing TAS authority to new areas would require a new tribal application. Is this correct?

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[4] A case which in dicta implied that, contrary to EPA's then effective and still current rules, "[t]he Clean Water Act ... explicitly gives authority over waters within the borders of the reservation to the tribe ... " 266 F.3d at 747.

[5] The *Phillips Petroleum* court also noted that this doctrine has been applied as well to non-tidal navigable water. 484 U.S. at 479.

How would the proposed reinterpretation deal with issues like those Wisconsin has raised with respect to the pending Forest County Potawatomi Community's TAS application? Earlier this summer Wisconsin submitted comments to EPA in opposition to the Forest County Potawatomi Community's application for TAS authority. A copy of those comments is attached because they demonstrate a number of the problems with EPA's existing TAS review process which the proposed reinterpretation appears not to address. For example:

- Why should a tribe which acquires title only to scattered uplands decades after statehood (i.e., after Wisconsin obtained "dominion and sovereignty" over all navigable waters within its borders) be deemed to have authority to regulate the quality of *adjacent* waters the tribe has never acquired? How should they be deemed to have acquired more (regulatory authority) by purchase than their predecessors in title possessed? Perhaps obviously, this is a concern given that such authority would allow a tribe to object (under 40 C.F.R. § 122.4(d)) to the issuance of upstream, *off*-reservation discharge permits which the tribe claims does not meet its water quality standards.

- Will EPA grant TAS applications under the proposed reinterpretation even where a reservation has no exterior boundaries?

We understand that EPA engaged in a "tribal consultation and coordination process" with the tribes "from April 18 through July 7, 2014," and that EPA intends to publish a proposed new "interpretive rule" this fall.[6] While Wisconsin appreciates your consideration of and answers to the questions raised in this letter, we respectfully asks that EPA delay the publication of a proposed new rule until it engages in a similar period of consultation and coordination with the affected states.

Thank you very much.

Sincerely,

Cathy Stepp
Secretary, Wisconsin Department of Natural Resources

Enclosure

[6] http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm